

(1998) 12 MAD CK 0055

In the Madras High Court

Case No : W.P.No.17980 of 1998 and W.M.P.No.27025 of 1998

Mohammed Asif

APPELLANT

Vs

The State of Tamil Nadu and others

RESPONDENT

Date of Decision : 03-12-1998

Acts Referred:

Constitution of India, 1950 — Article 14, 21
Criminal Procedure Code, 1973 (CrPC) — Section 2, 24, 321
General Clauses Act, 1897 — Section 13

Citation : (1999) 2 CTC 339 : (1999) 1 LW(Cri) 312 : (1999) 3 RCR(Criminal) 128

Hon'ble Judges : V.S. Sirpurkar, J

Bench : Single Bench

Advocate : Mr. N. Jothi, for the Appellant; Mr. R. Shanmughasundaram, Public Prosecutor assisted by Mrs. T. Kokilavani, Government Advocate, for the Respondent

Judgement

1. Rule Public Prosecutor takes notice. Heard immediately with consent of the parties.

2. The writ petition herein involves an unusual but interesting question of law. The petitioner questions the decision on the part of the Government

to appoint more than one Special Public Prosecutor for conducting the trial against the petitioner.

3. Following facts would highlight the controversy:

The petitioner was a Minister for Rural Industries of Government of Tamil Nadu in the cabinet headed by Selvi. J. Jayalalitha. He has presently

been prosecuted for various offences including the offences under the Prevention of Corruption Act. These prosecutions are pending before the

Special Courts. The petitioner is concerned with the case covered by CB CID/Hq

Crime No. 17 of 96 and that one Thiru. G. Krishnamurthy, the 5th respondent herein, was appointed as a Special Public Prosecutor by G.O.Ms.No. 118, Public (Special A) Department, dated 28.1.1997. He further points out that the Government, by G.O.Ms.No. 430, Public (Special A) Department, dated 16.4.1997, has further appointed as many as eight Senior Advocates as Special Public Prosecutors to conduct the cases before the Courts and in this G.O., the earlier G.O.MS.NO. 118, dated 28.1.1997 is also referred to so as to mean that the Special Public Prosecutors appointed would also be the Special Public Prosecutors for the cases covered under that G.O.Ms.No. 118 which includes the case against the petitioner. It is further pointed out that the Government has further passed G.O.Ms.No. 1493, Public (Special A) Department, dated 27.11.1997 and in that G.O., the Government has appointed one Thiru. P. Venkatasubramaniam as a Special Public Prosecutor to conduct the prosecution of the trial case in CB CID Cr.No. 17 of 1996. Thus, the Government has appointed more than one Special Public Prosecutor in C.B. CID Cr.No.17 of 1996 with which he is concerned. The above mentioned Government Orders are challenged in the present writ petition as constitutionally invalid as also impermissible under the provisions of the Code of Criminal Procedure.

4. The question that falls for consideration in this writ petition is whether more than one Public Prosecutor could be appointed to conduct the prosecution on behalf of the state and further whether on the backdrop of the present facts and circumstances, such appointment could be termed as an arbitrary exercise of powers and as such impinging upon the fundamental rights of the petitioner under Article 14 of the Constitution of India.

5. Mr.N. Jothi, learned Counsel appearing for the petitioner, in his usual persuasive manner, has taken me through the various relevant provisions of the Criminal Procedure Code and has tried to canvass that under the provisions of Criminal Procedure Code itself, such appointment of more than one Special Public Prosecutor would be impermissible.

6. Section 2(u) of the Criminal Procedure Code provides the definition of a "Public Prosecutor" which means any person appointed u/s 24 and includes any person acting under the direction of a Public Prosecutor. Section 24 of the Criminal Procedure Code deals with the subject of "Public

Prosecutors". Sub-section (1) thereof provides that for every High Court, the Central Government or the State Government, after consultation with the High Court, shall appoint a Public Prosecutor and may appoint one or more Additional Public Prosecutors, for conducting the matters of the Central Government or the State Government, as the case may be. Sub-section (2) provides that the Central Government may appoint one or more Public Prosecutors for conducting any case or class of cases in any district or local areas. Sub-section (3) provides, for every district, the State Government shall appoint a Public Prosecutor and may appoint one or more Additional Public Prosecutor for conducting the district. These three sub-sections, therefore, pose no problem. While sub-section (1) deals with "Public Prosecutors" in the High Court, sub-sections (2) and (3) speak about the "Public Prosecutors" in any district or local area. Sub-sections (4) and (5) have been very heavily relied upon by Mr. Jothi which provide that for appointing the Public Prosecutors, a panel of names shall be prepared by the District Magistrate, who, in his opinion, are fit to be Public Prosecutors" for the District and unless no person, who is not included in that list, shall be appointed as the Public Prosecutors for the District. These provisions are obviously with the idea that the District Public Prosecutor should be a man of confidence of the State Government whose feasibility is assessed by a District Magistrate and he should also be a person eminent enough and a local one, so that he is noticed by the District Magistrate, while preparing a panel. Sub-sections (6) and (6-A) are not relevant for the purpose of the present case. Sub-section (7) provides that the Public Prosecutor or the Additional Public Prosecutor must have put in practice as an Advocate for not less than seven years. Sub-section (8) of Section 24 provides for the appointment of the Special Public Prosecutors. It will be better if the said sub-section is quoted:

(8) The Central Government or the State Government may appoint, for the purpose of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor.

It is clear from the language that the Special Public Prosecutor, who must have a practice of minimum ten years, is appointed by the Central Government or the State Government for the purpose of any case or class of cases. It is very clear that sub-sections (4) and (5) of Section 24

operate in entirely a different sphere as compared to sub-section (8), while sub-sections (4) and (5) are related only to the Public Prosecutors for

the district, that is not the case with sub-section (8) which provides for a Special Public Prosecutor who has no concern with the District affairs as

such and he is only concerned with the case or class of cases for which he is appointed. The learned counsel for the petitioner has his first

objection against the appointments made under the Government Orders to the effect that these appointments are not in keeping with sub-sections

(4) and (5) dealt with above. The learned counsel argues that these persons, who are appointed as the Special Public Prosecutors, are not in the

first place from the panel made by the District Magistrate for Chennai District, where these persons are to work as Special Public Prosecutors.

Now, as has already been pointed out, the two eventualities are distinct and separate. While a Public Prosecutor for the District is glued to the

District, the Special Public Prosecutor does not have necessarily to be operative only in a particular district. For example, if a Special Public

Prosecutor is appointed for any case or class of cases which are distributed all over the State, the Special Public Prosecutor would be in a position

to deal with all of them, sheerly owing to his appointment as a Special Public Prosecutor, which an ordinary Public Prosecutor would not be in a

position to do. The argument, therefore, has to fail on this count alone. That apart, there is no factual basis made out that the concerned

respondents are not included in the panel, if prepared by the District Magistrate of Chennai.

7. The learned counsel then argued that under the provisions, there was nothing to show that the Government, Central or State could appoint more

than one Public Prosecutor or Special Public Prosecutor for one case, unless the appointment of the erstwhile Public Prosecutor is cancelled. My

attention was drawn to the fact that in a Sessions Case against the petitioner, which concerns the offences under the Prevention of Corruption Act,

more than one Public Prosecutor would be conducting the prosecution owing to the appointments made in the questioned Government Orders

without cancelling the earlier appointment. The learned counsel urges that this is not permissible at all under the provisions. These arguments are

more or less based on the observations of the Apex Court in Sheonandan Paswan Vs. State of Bihar and Others, which case was heavily relied

upon by Mr. Jothi. That was case, where some accused persons were being prosecuted for the offences under the Prevention of Corruption Act.

The Chief Judicial Magistrate had already issued a process against the accused. One Shri Awadhesh Kumar Dutt, Senior Advocate, was

appointed as a Special Public Prosecutor during the pendency of the case. One of the accused replaced the erstwhile Chief Minister and formed

his Government. The Government headed by the accused, without cancelling the appointment of Shri Awadhesh Kumar Dutt and others,

prosecuted to appoint a fresh panel of lawyers for conducting the case and one Shri Lalan Prasad Sinha, who was one of the panel advocates, was

allotted the case against the Chief Minister. He, on instructions of the Government, proceeded to withdraw from the prosecution u/s 321 of the

Criminal Procedure Code. This withdrawal was challenged before the High Court which confirmed the withdrawal by dismissing the revision

petition in limine. The Apex Court was considering the correctness or otherwise of the withdrawal and the confirmation thereof by the High Court.

8. Mr.N. Jothi, learned counsel appearing for the petitioner, tried to rely on some observations made in this judgment. It is argued before the Apex

Court that Shri. Lalan Prasad Sinha was merely one of the Public Prosecutors appointed by a fresh panel and he had no authority over the head of

Shri. A.K. Dutt to apply for the withdrawal of the prosecution, particularly because the appointment of Shri.A.K. Dutt, Special Public Prosecutor,

was not cancelled, The supreme Court has observed in paragraph 17 as follows:

It is true that the appointment of Shri A.K. Dutt made by the previous Government as the Special Public Prosecutor to conduct this case had not

been cancelled, though in fitness of things the new Government should have done so but that did not prevent the new Government to make a fresh

appointment of a Public Prosecutor and to put him in charge of the case. Appointments of Public Prosecutors generally fall u/s 24(3) but when the

State Government appoints Public Prosecutors for the purposes of any case or class of cases the appointees become Special Public Prosecutors

u/s 24(8) and in the instant case under the Law (Justice) Department's letter dated 24th February, 1981 a fresh panel of lawyers consisting of 4

Advocates including Shri Lalan Prasad Sinha was constituted ""for conducting cases pertaining to Vigilance Department both at Headquarters at

Patna as also outside Patna"" and, therefore, Shri Lalan Prasad Sinha will have to be regarded as having been appointed as Special Public

Prosecutor u/s 24(8). (Italics supplied)

Relying on the emphasised portion, Mr. Jothi, learned counsel for the petitioner, says that even here, before making the additional appointments,

the State Government should have withdrawn the earlier appointment made for this case and the fresh appointments made would be clearly illegal.

In the first place, the argument is completely incorrect. The observations made by the Apex Court and more particularly the emphasised portion

cannot be read out of context which is trying to be done by the petitioner herein. In the reported decision, the appointments were made by the

previous Government, while the fresh appointments were made by the subsequent Government. Probably, because of that, the Apex Court went

on to suggest that the appointment made by the previous, Government should have been cancelled in fitness of things. That is not the situation here.

The old as well as the additional appointments are made by one and the same Government. That is clearly a distinguishing factor. Besides, the said

observations do not anywhere suggest that the subsequent appointments are bad for that reason. There is nothing to suggest in the observations of

the Apex Court that any additional appointments made without cancelling the previous appointments of the Special Public Prosecutor are rendered

bad in law or even considering the propriety of the things. The learned counsel, therefore, cannot take advantage of the emphasised portion of the

Apex Court judgment.

9. It is then pointed out by Mr. Jothi that one of the reasons which weighed with the Apex Court in upholding the action taken by the subsequently

appointed Public Prosecutor was that the erstwhile Public Prosecutor Shri A.K. Dutt had not actually conducted the prosecution and it was only

the subsequently appointed Special Public Prosecutor Shri Lalan Prasad Sinha who was conducting the prosecution. Relying on this, Mr. Jothi

submits that in this case, the earlier Public Prosecutor has actually conducted the matter and has actually appeared and, therefore, the subsequent

Public Prosecutor would not be able to act. Now something, which is not there in the observations of the Supreme Court, is trying to be read here.

In the first place, the observations are not applicable to the present situation at

all. In the reported case, the Apex Court was considering as to whether the action ,by subsequently appointed Special Public Prosecutor could be said to be an authorised action. Such is not the case here. What is being questioned is the appointment of some Special Public Prosecutors by a subsequent Order. We are not concerned here with any action of the Public Prosecutor already appointed or any step taken by subsequently appointed Special Public Prosecutors. The reliance on paragraph 17 and the observations made therein are completely uncalled for.

10. The learned counsel then argued that there can be no plurality of the Public Prosecutors and under the provisions of the Criminal Procedure

Code, there cannot be more than one Public Prosecutor for a particular case. I am afraid, the language of Section 24(8) of the Criminal Procedure

Code does not suggest any such thing. Section 13 of the General Clauses Act is a complete answer to this argument, even if it is tried to be argued

that Section 24(8) of the Criminal Procedure Code refers to the appointment of "a" Special Public Prosecutor. That apart, even the language of

Section 24(1) of the Criminal Procedure Code authorises the State Government to appoint a Public Prosecutor and one or more Additional Public

Prosecutors, for conducting in such Court, any prosecution, appeal or other proceeding. The language does not prevent the plurality of Public

Prosecutors in respect of a prosecution, an appeal or a proceeding. In short, there is nothing which can be found from the language of Criminal

Procedure Code which could shun the appointment of more than one Public Prosecutor for a case. This becomes all the more prominent on the

backdrop of the accused side undoubtedly having right to be. defended by more than one lawyer. There is nothing wrong in the prosecuting agency

also being given the same privilege.

11. The learned counsel then argued that if the prosecution is conducted by more than one Prosecutor, that would be prejudicial to the accused

and it would also lead to a chaos in the trial. How the prosecution should be conducted could be left to the prosecution itself. It is not for the

accused to comment upon that so long as the conduct of the prosecution is fair and within the four corners of law and does not spell any prejudice

for the accused. The learned counsel was not able to show in what manner the prejudice would be caused to the accused if the prosecution is

conducted by more than one Public Prosecutor. The learned counsel expressed his apprehension that the defence side would be cowed down by

the large number of prosecuting counsel. I do not agree. There is no question of the defence side being cowed down or being browbeaten merely

because the number of Special Public Prosecutor are more. One cannot ignore the fact that a trial is not "free for all" affair. There is always a

Presiding Officer who is duty bound to control the proceedings. Such eventuality appears to be only imaginary and has no factual basis at least till

today. If that eventuality happens, it would be for the accused to take appropriate steps in law.

12. The learned counsel further argued that there are in all nine Courts dealing with the cases under the Prevention of Corruption Act which are

being managed by a Public Prosecutor. The appointment of more than one Public Prosecutor for a particular case is, therefore, nothing but a

deviation from the normal practice which by itself would mean the breach of Article 14 of the Constitution of India. The learned counsel avers that

the accused person in this case has been singled out and an army of Public Prosecutors is being unleashed at the accused as compared to the other

accused facing prosecutions in that very Court, thus this particular petitioner is discriminated against. Rhetorics has no place in law and the Courts.

It cannot be said that merely because more than one Special Public Prosecutor are appointed, there would be any breach of fundamental right of

the accused. In fact, if it is within the powers of the State Government to appoint more than one Public Prosecutor, it would be left to the discretion

of the State Government alone to appoint as many Public Prosecutors as it wants. There is no right in the accused that prosecution against him shall

be conducted only by one Public Prosecutor and not by more than one. The accused cannot rely on the fact that in other cases against the other

accused, the prosecutions are being conducted only by one Public Prosecutor. That is for the State to decide and it certainly depends upon the

volume of the case, the facts involved, the number of witnesses and the volume of transactions involved, apart from other relevant factors. No

relevant factors have been shown factually before me. This is of course apart from the fact that the accused has no right to control the trial by

insisting upon that only one Public Prosecutor should conduct the trial. In fact, in a different context, the Division Bench of the Bombay High Court

has observed that ordinarily it is not for the accused to choose the Public Prosecutor, nor can we have any say in the matter of choice of the Public

Prosecutors. In a reported decision in Vijay Valia and etc. Vs. The State of Maharashtra and etc., the Division Bench of the Bombay High Court

had observed that the accused cannot claim a right that the prosecution against him be conducted by a particular Prosecutor and not by any other.

It is true that this Judgment was upset by the Apex Court in the reported decision in Mukul Dalal and Others Vs. Union of India (UOI) and

Others, on the ground that the rule under which the Special Public Prosecutor was appointed itself was unconstitutional. That is not the controversy

in the present case. Though the Judgment has been upset on other questions by the Apex Court, the above mentioned observations have not been

faulted with. Even otherwise, it cannot be left for the accused to decide as to how many Public Prosecutors should conduct the prosecution against

him unless he shows a tangible prejudice therefrom and indeed such prejudice is neither pleaded nor displayed before the Court. It is, therefore,

not possible to accept the contention that in appointing more than one Public Prosecutor, the constitutional right of the petitioner under Article 14

of the Constitution of India is breached in any manner.

13. The learned Counsel for the petitioner has tried to make reference to some other Supreme Court judgments in support of his contention based

on Article 14. First such decision is the celebrated judgment in Delhi Transport Corporation Vs. D.T.C. Mazdoor Congress and Others, where the

Apex Court was called upon to decide Regulation 9 (b) which provided for termination of service of a permanent employee by simply issuing the

monthly notice or pay in lieu thereof without recording any reason in the order and without any hearing given to the employee to controvert the

allegation on the basis of which the purported order is made. The learned Counsel pointed out that the procedure as laid down by Regulation 9 (a)

and (b) was harshly criticised on the ground of its being arbitrary and discriminatory. There can be no dispute with the propositions laid down by

the Apex Court in that case. However merely because the procedure in Regulation 9 (a) and 9 (b) was dubbed as arbitrary, unfair, unjust and

unreasonable and on that ground, the said regulation under the Delhi Road Transport Authority (Conditions of Appointment and Service)

Regulations, 1952 was struck down, the same logic cannot be made applicable to the present action of appointing more than one Public

Prosecutor to conduct the prosecution. The decision is not at all applicable to the present case. Similarly, a reference was made to the decision of

Francis Coralie v. Union Territory of Delhi, AIR 1981 S.C. 746 wherein the Apex Court has guarded the right of the detenu to have legal

consultation. Even this case has no connection whatsoever with the present controversy and the reliance on the same is uncalled for. The learned

counsel also relied upon the decision of the Apex Court in Mahabir Auto Stores and others Vs. Indian Oil Corporation and others, to suggest that

every action of the State Executive Authority must be subject to the rule of law and must be informed by reason. So, whatever be the activity of

the Public Authority, it should need the test of Article 14 of the Constitution. If a Government action even in the matters of entering or not entering

into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. The learned counsel for the petitioner also relied on the

observation to the effect that rule of reason and rule against arbitrariness and discrimination, rules of fair play and natural justice being part of the

rule of law are applicable to the actions of the State instrumentality in dealing with citizens. There can be no dispute about it. However, it must be

remembered that these observations have been made in the light of an entirely different set of facts. Again it has not been shown presently as to

how the action in appointing more than one Public Prosecutor offends the spirit of Article 14 of the Constitution of India. I have already held,

merely because in other trials there is one Public Prosecutor, it cannot be insisted by the accused that in his trial also there ought to be one Public

Prosecutor and not more. Article 14 does not go by such a rule of thumb. It is, therefore, not possible to accept the argument put forward by the

learned Counsel for the petitioner that the Government Orders making the appointment of Special Public Prosecutors, who are party respondents

here, suffer from vice of arbitrariness. There is no factual justification for such a contention raised in the Petition nor has the petitioner been able to

display any prejudice on account of such appointments. In view of that, it must be held that the writ petition has no merit and must be dismissed as

such. It is accordingly dismissed without any order as to costs. W.M.P.No.27205 of 1998 is closed.